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THE COMPLIANCE STRATEGIST

4 Steps Boards Should Take Toward Compliance 2.0

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Boards of directors that are serious about their compliance oversight duties understand the difference between a compliance program that is mere window-dressing and one that is intended to find, fix and prevent misconduct. Yet many boards do not know the difference between the Compliance 1.0 model—in which compliance is a captive arm of the legal function—and the alternatives.

Boards are under extraordinary pressure to perform. Aggressive oversight by the U.S. Department of Justice and regulatory agencies, along with activist shareholders and class action plaintiffs' lawyers, have forced corporate boards to respond to risks and embrace new solutions. Old models for corporate oversight and monitoring are quickly being replaced with new approaches that require board members to keep themselves up to date on ethics and compliance developments, and they have to ensure the board has adequate access to unfiltered information and reports from an empowered and independent chief compliance officer.

Board members are becoming more comfortable with overseeing ethics and compliance programs. Their willingness to exercise their responsibilities requires more than just lip service—it means they have to roll up their sleeves and dig into the nitty-gritty of ethics and compliance. In doing so, they need to recognize that change in this area is rapid, and new models are replacing old and tired approaches to compliance. The Justice Department has set its sights on corporate boards, and the sooner board members accept the new paradigm of risk management and compliance strategies, the better for everyone involved.

Board chairs, audit committee chairs, general counsel, corporate secretaries and other gatekeepers should ask themselves: Has our board taken the time to assess its compliance program and overall strategy? If not, what are they waiting for? Because we are now at a time when anyone who can read headlines can see the "Nails in the Coffin of Compliance 1.0" and appreciate the persistent mythsassociated with this flawed model. These might be the first steps to a robust approach to a compliance program that can vigorously "work" to detect and prevent misconduct.

To properly exercise their compliance oversight duties, Boards should take these four basic steps toward Compliance 2.0:

1. Get Modern Board Training to Support Compliance Oversight

The first step for boards serious about compliance is to obtain some modern, "Not your Father's" board training to clarify their oversight role and establish a common foundation and understanding for their exercise of that role. Decades of relying on fire-breathing law firm partners to pontificate on the "rapidly changing" regulatory landscape and scary stories of companies hit with billions in fines has done little to prepare boards for the somber and critical task of proactively overseeing their firms' compliance programs, culture and reputations. Knowing the difference and getting some up-to-date board training from qualified compliance professionals should be the first steps on the path to better outcomes.

2. Promote the CCO's Role in the Boardroom

The old, tired model of Compliance 1.0 depends on shielding the board from thinking outside the boardroom. Instead, lawyers continue to advise boards with the same old refrain: "We have to avoid litigation, and the way to do that is to stick to old solutions. Let legal run the show and everything will be fine."

Unfortunately, no one is in the boardroom to explain to board members how limiting and archaic this approach is in today's fast-moving risk management world. CCOs are carrying a new banner—one that is creative, minimizes risk and promotes healthy transparency, leadership and innovation. Compliance chiefs have a greater role to play in the boardroom, and they should have increased access, communication and reporting responsibilities beyond the minimal role they have today. This is why PwC has called the CCO the C-suite star of 2025.

3. Strengthen Oversight and Ensure Compliance Is Structured for Success

Boards must determine at the outset whether, and to what extent, their firm's program is structured for success. Compliance 1.0 focused compliance in the GC's territory. Companies are rapidly abandoning that structure and recognizing the benefits of Compliance 2.0—empowering the CCO by moving the CCO to the C-suite, giving the CCO line of sight to compliance risks across the entire organization and protecting the CCO's independence as a critical manager of the company's culture. Boards are embracing this model in health care, financial institutions and other industries in which compliance is a critical part of an overall risk management strategy. After the recent $5 billion-plus DOJ settlement with five big banks for FOREX price-fixing, every bank board should be stepping up its oversight of their firm's compliance and culture. And for health care industry boards, it is important to note that Step No. 3 is NOT OPTIONAL. To the contrary, the move to Compliance 2.0 has been specifically outlined by the U.S. Department of Health and Human Services inspector general in a recent directive addressed directly to boards.

4. Attend to Corporate Culture to Increase Sustainable Profits

Compliance 1.0 was based on a dangerous and misguided assumption that dollars spent on ethics and compliance meant lower profits. That old way of thinking has been abandoned. Research has conclusively demonstrated the exact opposite—companies that attend to ethics and compliance are more profitable. The logic behind this basic idea is straightforward: an ethical culture translates into lower misconduct rates, improved employee morale and greater sustainability. The Compliance 2.0 CCO and compliance program can help to achieve these goals.

The stakes for corporate boards have never been higher. Law enforcement is aching for a criminal case against corporate board members for willful blindness—failure to act in response to red flags and risk of misconduct. If a corporate board learns of potential misconduct, or even weaknesses in its ethics and compliance program, it is imperative that they have the means and the desire to respond. The Compliance 2.0 model is the best guarantee they have for making sure they never come under government scrutiny. An empowered CCO is the best insurance policy against an ethics and compliance disaster, such as when General Motors' lawyers failed to act or when corporate culture was hijacked by senior executives in the Wal-Mart C-suite. A board that is serious about compliance should start down the path to Compliance 2.0 before third parties require them to do so.

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